

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ESTATE OF EUGENE T. CAPUZZI, M.D.,
Deceased

MICHAEL CAPUZZI and EUGENE
T. CAPUZZI, JR.,

Plaintiffs-Appellants.

v.

CHRISTINA FISHER

Supreme Court No: 121106
Court of Appeals No: 227750
Lower Court No: 99-11693 SE

Defendant-Appellee.

BRIEF ON APPEAL-APPELLEE

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Relief Requested

Appellee requests that this Court affirm the opinion of the Court of Appeals, and remand this action to the trial court for further proceedings consistent with the opinion of the Court of Appeals.

Statement of Questions Involved

I. WHETHER THE DEATH OF THE PRINCIPAL REVOKES THE AGENT'S ORDER TO TRANSFER JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY?

The Court of Appeals answered: Yes.

The trial court answered: No.

Appellee answers: Yes

Appellants answer: No.

II. WHETHER THE PRINCIPAL'S DEATH WOULD HAVE REVOKED THE ORDER TO TRANSFER THE JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY IF THE PRINCIPAL HIMSELF HAD REQUESTED IT?

The Court of Appeals did not address this issue.

The trial court did not address this issue.

Appellee answers: Yes

Appellants answer: No.

III. WHETHER THE FACT THAT THE THIRD PARTY FAILED TO COMPLETE THE TRANSFER TRANSACTION BEFORE THE PRINCIPAL'S DEATH COMPELS THE CONCLUSION THAT THE NON-TRANSFERRED SHARES REMAINED IN THE PRINCIPAL'S ESTATE, REGARDLESS WHETHER THE AGENT RETAINED HIS POWER OF ATTORNEY OR WHETHER HIS PAST AUTHORIZED ACTS REMAINED VALID AFTER THE PRINCIPAL'S DEATH?

The Court of Appeals did not address this issue.

The trial court did not address this issue.

Appellee answers: Yes.

Appellants answer: No.

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Counter-Statement of Material Proceedings and Facts

I. Background Facts

On August 10, 1998, Michael Capuzzi, acting under a power of attorney naming him as his father's attorney-in-fact (Appellants' Appendix, 13a), sent a letter to Northville Downs Race Track, asking the managers of the partnership which owned the racetrack to transfer his father's remaining shares in the partnership to himself and his brother (Appellants' Appendix, 14a). The partnership shares were the last substantial assets of Eugene Capuzzi's personal estate. Over the previous six weeks, Michael Capuzzi and his brother Eugene Capuzzi, Jr., acting under the power of attorney, had transferred to themselves and their mother virtually all of the assets formerly owned by their father. The effect of these transactions was to disinherit their sister, Christina Fisher, Appellant, who had been named under her father's will and trust as an equal beneficiary with her two brothers.

Eugene Capuzzi had been ill for several years. On August 14, 1998, he passed away in Cheboygan County, Michigan. It is not known when Northville Downs received Michael Capuzzi's August 10 letter, but the manager of the partnership, Louis Carlo, wrote back on August 19. Mr. Carlo explained that he was not able to make the transfer Michael Capuzzi requested in his August 10 letter:

"Dear Mike:

With regard to your letter of August 10th, 1998, unfortunately your father passed away before I could make the transfer you requested. I have contacted our general counsel who informs me that death of the principal revokes the Power of Attorney and the agency relation created by it.

Please forward a copy of your father's Will so we may determine the disposition of the five shares of the limited partnership."
(Appellants' Appendix, 15a).

The partnership assets were included in the inventory of assets of the Estate of Eugene Capuzzi.

Michael Capuzzi is an attorney at law, a member of the Michigan bar, and practices in Chicago, Illinois. Michael Capuzzi drafted the Durable Power of Attorney (Appellant's Appendix, 13a). The Durable Power grants Michael Capuzzi authority "to sell, assign, transfer and deliver any stocks, bonds or other securities of any kind, . . . " The Durable Power nowhere gives Michael Capuzzi explicit authority to make gifts of his father's property to himself or jointly to himself and another. Despite this authority in the Durable Power, Michael directed the transfer of his father's property to himself and his brother without any payment or exchange of value.

Michael Capuzzi and Eugene T. Capuzzi, Jr. have argued that it was their father's intent to disinherit their sister. It is undisputed, however, that at the time of his death, the decedent had never altered his will leaving equal shares in his estate to each of his three children. Self-serving statements by the Appellants that they were simply carrying out their father's wishes by transferring his property to themselves to disinherit their sister must be viewed with some level of skepticism, when their father made no effort to change the terms of his will to accomplish that end. Appellee will present testimony to the trial court that she had a close relationship with her father, and that her brothers and mother went to great lengths to keep her away from her father during his final illness.

II. Material Proceedings

A. Proceedings in Cheboygan Probate Court

Appellants filed a motion for summary disposition in the Cheboygan County Probate Court under MCR 2.116(C)(10); seeking to have the decedent's five partnership shares of the John J. Carlo joint venture adjudged to be non-estate assets and Appellants' individual personal property. Appellee opposed the motion. The personal representative of the estate, the parties' mother, did not oppose the motion. The motion was granted by an order filed on April 18, 2000.

Appellee filed a timely motion for rehearing on May 1, 2000. The probate court denied the motion for rehearing on May 18, 2000. Appellee filed a timely claim of appeal on June 6, 2000.

B. Proceedings in Court of Appeals

On February 15, 2002, the Court of Appeals issued an unpublished *per curiam* opinion reversing the order of the trial court which had transfer the disputed partnership shares to Appellants. The Court of Appeals also reversed the trial court's award of costs to Appellants. The action was ordered to be remanded to the trial court for further proceedings consistent with the Court of Appeal's opinion.

Argument

The Court of Appeals properly construed existing law on an issue regarding which there is no dispute. The authority of an agent to act under a durable power of attorney expires with the death of the principal. Uncompleted transactions initiated by the agent acting under the power of attorney may not be completed by third parties who have actual knowledge of the intervening death of the principal.

I. WHETHER THE DEATH OF THE PRINCIPAL REVOKES THE AGENT'S ORDER TO TRANSFER JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY?

An agent's authority under a power of attorney terminates instantaneously at the death of the principal. Uncompleted transfers cannot be completed after the death of the principal, unless the agency was coupled with an interest.

A. The Authority of an Agent to Act Under a Durable Power of Attorney Expires with the Death of the Principal.

An agent's authority terminates upon the principal's death. *Weaver v. Richards*, 144 Mich. 395 (1906); *Restatement (Second) of Agency*, § 120. With this elementary proposition of agency law Appellants do not quarrel. Appellants instead argue a different point: Appellants suggested that a property transfer on behalf of a principal begun by an agent but not completed before the principal's death, can and indeed must be completed after the principal's death, even if the agent's power is not coupled with an interest. Appellants argued that this rule applies even when the third party directed to make the transfer learns of the principal's death before consummating the transfer. This novel proposition was and is unsupported by any authority, but was nevertheless accepted by the trial court. This was error. The Court of Appeals correctly ruled that the death of a principal instantaneously terminates an agent's authority, and that transactions begun but unconsummated cannot be completed. As noted by the Court of Appeals, this rule applies even more forcefully where the transaction was not completed by the third party because it learned of the principal's death in the interim. The probate

court erred by ordering the partnership to transfer the decedent's shares to Michael Capuzzi and his brother under the authority of Michael Capuzzi's August 10, 1998 request. The Court of Appeals correctly reversed the erroneous order of the trial court.

Except where it is coupled with an interest, an agency under a power of attorney is terminated by death of the principal. *Weaver v. Richards*, 144 Mich. 395 (1906). This rule is uniformly accepted everywhere in this country:

[S]ince the authorized acts of the agent are in their nature the acts of the principal, and by legal fiction the agent's exercise of authority is regarded as an execution of the principal's continuing will, the rule is well established both at common law and by statute that the death of the principal, in the absence of circumstances giving the agent an authority coupled with an interest, ordinarily terminates the agency.

...

Where the agency is not coupled with an interest, the death of the principal operates to revoke an authority to draw money on deposit, to open a deposit box, to sell or transfer the principal's property, to convey land and execute a deed, to deliver a deed to occupy land, or to execute and deliver a lease. The death of the principal has also operated to revoke an authority to make collections, to make payments, to make an assignment, to make delivery of a gift, to negotiate a settlement, to manage property, or to act generally as agent. 2A *Corpus Juris Secundum*, Agency, § 135 pp. 754-756. (footnotes omitted).

The general rule that an agency is terminated by the death of the principal applies equally to a power of attorney or to specific authority given to an agent to execute a specific act. Thus, if the power is not coupled with an interest, it is revoked by the death of the principal. Applying these principles, a power of attorney to convey lands, or to collect debts is terminated by the principal's death. Further, the attorney, after the principal's death, may not complete an act undertaken for the benefit of the principal and intended to be completed in the latter's lifetime. 3 *Am Jur 2d*, Agency, §55 (footnotes omitted).

The conclusion is inescapable: Michael Capuzzi's authority to act under his father's Durable Power of Attorney terminated when his father died on August 14, 1998.

B. The Death of the Principal Immediately Terminates the Agency, and Prevents Completion of Unfinished Transfers.

The death of the principal operates as an instantaneous and absolute revocation of the agent's power. *Crowe v. Trickey*, 204 U.S. 228, 51 L.Ed. 454, 27 S. Ct. 275 (1906), *Hanrick v. Patrick*, 119 U.S. 156, 30 L.Ed. 396, 7 S. Ct. 147 (1886). This rule is so strong that it has been held that transactions undertaken for the benefit of the principal and intended to be completed in the principal's lifetime, may not be completed after the principal's death. *Mubi v. Broomfield*, 492 P.2d. 700; 108 Ariz. 39 (1972).

Subject to exceptions, the general rule is that revocation of authority is effective immediately upon the principal's death and the fact that the agent has performed, as authorized, one or several acts of that which was contemplated as a single transaction does not operate to preserve or keep alive the power until the completion of the transaction. Accordingly it has been held that no payments could be made upon checks drawn by an agent who was authorized to make payments by check where the checks had been delivered during the lifetime of the principal but were not presented until after his decease and the consequent revocation of the agent's authority. Likewise no authority remains in an agent to deliver a lease signed by the lessor during his lifetime but not by the lessee." 2A *Corpus Juris Secundum*, Agency § 137, p. 757. (footnotes omitted).

The death of the principal terminates the agent's authority even if the agent does not know of the death:

Although a revocation of authority by act of the principal, to be effective, must be communicated to the parties affected, as discussed supra § 122, a revocation occurring through operation of law by the death of the principal, is generally held to be effective instantaneously as to the agent, although he has no knowledge of it. So, where at the time the principal was absent the agent executed a note and mortgage under a general authority, and it was subsequently adjudicated, because of his long absence, that the principal had died prior to the time of such execution, it was held, although the agent acted in ignorance of his principal's death, that his acts were not binding upon the estate of deceased, nor will a payment to an agent, ignorant of his principal's death, operate as a discharge of an obligation. 2A *Corpus Juris Secundum*, Agency, § 137, p. 758 (footnotes omitted).

In this case, Michael Capuzzi's authority to act for his father instantly terminated on his father's death. Both Michael Capuzzi and Northville Downs had actual knowledge of Eugene Capuzzi's death before the proposed transaction to transfer the decedent's partnership shares was accomplished. Michael Capuzzi had no enforceable "interest" in the transfer. Upon his father's death,

his authority under his father's Durable Power of Attorney terminated. Because Michael's authority terminated, the transfer he ordered could not be completed. The probate court erred by ordering that the transfer begun by Michael be completed as if Michael's authority remained intact after his father's death. The Court of Appeals properly reversed the probate court.

C. Completion of the Transfer Was Not a "Ministerial Act".

Appellants Michael and Eugene Capuzzi argue that once the request for a transfer was made, accomplishing the transfer was simply a "ministerial act" regarding which the partnership had no discretion. The probate court accepted this argument, although the Appellants presented no direct evidence of the terms of the partnership agreement or whether the requested transfer was permitted. Appellant made no attempt to present the trial court with a copy of the partnership agreement, and made no effort to inform the court of the contents of the agreement. Instead, Appellant offered the affidavit of a third party who described his dealings with the partnership in a purportedly similar transaction. This affidavit is not competent evidence either of the terms of the partnership agreement or of the procedures required to effect a transfer of the partnership shares.

Even assuming the requested transfer was permitted by the partnership agreement, the transfer was not a "ministerial act". As this Court is undoubtedly aware, virtually all partnership agreements require that recipients of transferred partnership shares execute a document assenting to the terms of the partnership's organizational documents. This step was never begun in the case at issue. Moreover, the partnership was obligated to consider whether Michael Capuzzi's alleged authority to make the transfer to himself and his brother as he requested was valid. "One dealing with an agent is put on notice and should make inquiry as to the scope of the latter's authority, where the agent's acts are in the agent's own interest". *Mich. Civ. Jur.*, Agency, § 59, p. 228 (citing *Lidke v. Jackson Vibrators, Inc.*, 1 Mich. App. 537 (1965) (reversed on other grounds 379 Mich. 370 (1967))). See also *Cutler v.*

Grinnell Bros., 325 Mich. 370 (1949) (“A person who deals with an agent is bound to inquire into the extent of his authority, ignorance of which is no excuse.” *Id.* at 376 (Emphasis original, citation omitted).)

Nor is this rule of law disputed anywhere else in this country. As provided in *Am. Jur. 2d*, Agency, § 83 “a third person dealing with a known agent may not act negligently with regard to the extent of the agent’s of authority or blindly trust the agent’s statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers”. This statement of law is supported in the text by citations to opinions from dozens of courts throughout the United States.

Applying this law to the facts of this case, the John Carlo Limited Partnership, owner of Northville Downs, had a duty under the law to inquire into the validity of the transfer requested by Michael Capuzzi. On its face, the proposed transfer involved making a gift of the principal’s assets to Mr. Capuzzi and his brother, a proposed transaction both suspect and potentially void because it is obviously self-dealing. Moreover, the authority for making the proposed transaction, the enclosed Durable Power of Attorney supplied by Michael Capuzzi, nowhere provided a gift-making power for the agent, let alone the power for the agent to make a gift to himself of the principal’s property. Accordingly, the partnership was under a duty to act with circumspection and prudence to ascertain whether Michael Capuzzi was acting within the scope of his powers. The requested transfer was anything but a “ministerial act”.

The partnership acted properly in refusing to make the requested transfer, particularly after it learned of the decedent’s death. The partnership properly refused to transfer the partnership shares after Eugene Capuzzi’s death terminated Michael Capuzzi’s authority to act for him. The probate court erred in ordering the completion of the transfer. The Court of Appeals properly reversed the probate court.

II. WHETHER THE PRINCIPAL'S DEATH WOULD HAVE REVOKED THE ORDER TO TRANSFER THE JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY IF THE PRINCIPAL HIMSELF HAD REQUESTED IT?

Because this case involved transfer of a partnership interest, an "order" by the principal to the partnership to transfer his partnership interest to his sons would have amounted to an appointment of the recipient of the order as an agent to accomplish the transfer. This limited agency would have terminated upon the death of the principal under standard agency law. Whether the principal himself or this agent under the durable power made the request to transfer the principal's partnership shares, the result would have been the same: the death of the principal before the transaction was completed would have revoked the order to make the transfer.

The case *In re Szabo's Estate*, 176 N.E. 2d 395; 10 N.Y. 2d 94 (N.Y. App. 1961) is instructive on this point. There, the decedent directed that certain of her stock certificates be reissued jointly with her son. She signed an assignment to accomplish this. Before the transfer agent acted on her direction, she died. The court held that the transfer she directed could not be completed because her death automatically revoked the authority of the transfer agent to complete the transaction.

III. WHETHER THE FACT THAT THE THIRD PARTY FAILED TO COMPLETE THE TRANSFER TRANSACTION BEFORE THE PRINCIPAL'S DEATH COMPELS THE CONCLUSION THAT THE NON-TRANSFERRED SHARES REMAINED IN THE PRINCIPAL'S ESTATE, REGARDLESS WHETHER THE AGENT RETAINED HIS POWER OF ATTORNEY OR WHETHER HIS PAST AUTHORIZED ACTS REMAINED VALID AFTER THE PRINCIPAL'S DEATH?

Since the Appellant's power of attorney was not coupled with an interest, the death of the principal revoked his authority. Any act initiated by the agent but uncompleted before the death of the principal has no effect on the estate of the principal. Failure to complete the action before the death of the principal compels the conclusion that the non-transferred shares remained in the estate of the principal.

The death of the principal not only terminates the authority of an agent, it prevents the agent's acts from having any effect on the principal's estate. "As a general rule, the death of the principal operates as an instantaneous and absolute revocation of the agent's authority or power, unless the agency is coupled with an interest. *Hence any act done by the agent, as such, after the principal's death will not affect the estate of the latter.*" 3 Am Jur 2d, Agency §55.

Conclusion

The decision of the Court of Appeals is correct. The probate court erred by granting Appellants' motion for summary disposition and ordering that the decedent's five partnership shares of the John J. Carlo Joint Venture be adjudged non-estate assets, and instead as Appellants' individual personal property. The partnership shares are part of the decedent's estate, and the uncompleted transfer requested by Michael Capuzzi on August 10, 1998 is a nullity.

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Dated: September 25, 2003

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PROOF OF SERVICE

The undersigned certifies that two copies of Brief on Appeal- Appellee were served on Daniel Martin and Peter Patrick by first class mail.

Dated: September 25, 2003

By: 
WILLIAM J. LAMPING (P30785)